# In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1538

JOHN D. CALLAHAN, ALLAN L. KELLY, PAT J. METKE, FRANK A. MOORE, and JAMES W. WHITTAKER, each individually, and as a member of the STATE GAME COMMISSION OF THE STATE OF OREGON; JOHN McKEAN, individually, and as DIRECTOR OF THE OREGON GAME COMMISSION; and HOLLY HOLCOMB, individually and as DIRECTOR OF THE OREGON STATE PATROL & OREGON GAME ENFORCEMENT DIVISION,

Petitioners,

v.

CHARLES E. KIMBALL, STEPHEN L. LANG, ALLAN LANG, LEONARD O. NORRIS, JR., and JAMES KIRK,

Respondents.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES H. CLARKE
800 Pacific Building
520 SW Yamhill Street
Portland, Oregon 97204
Counsel for Petitioners

JAMES A. REDDEN
Attorney General of Oregon
WALTER L. BARRIE
Solicitor General
BEVERLY B. HALL
Assistant Attorney General
Of Counsel

# INDEX

## INDEX (Continued)



## TABLE OF AUTHORITIES

### Cases





## TABLE OF AUTHORITIES (Continued)



### Statutes and Treaties



### Texts, Treatises and Other Authorities

# In the Supreme Court of the United States

October Term, 1978

No. _____

JOHN D. CALLAHAN, et al,

Petitioners,

v.

CHARLES E. KIMBALL, et al,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

Petitioners pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered January 26, 1979.

## OPINIONS BELOW

The opinion of the Court of Appeals, as yet unreported, is set out in Appendix A, infra 23. The opinion of the District Court of September 10, 1976 and its supplemental opinion and order of May 11, 1977 are unreported. They are set out in Appendix B, infra 43.

The prior opinion of the Court of Appeals of February 26, 1974 is reported at 493 F2d 564. It is set out in Appendix C, infra 49. This Court's order of November 18, 1974 denying certiorari is found at 419

US 1019. The opinion of the District Court of March 15, 1973 is unreported. It is set out in Appendix D, infra 61.

## JURISDICTION

The judgment of the Court of Appeals was entered January 26, 1979. Petitioners did not file a petition for rehearing, and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC § 1254(1).

## QUESTIONS PRESENTED

A treaty signed in 1864 between the Klamath and Modoc tribes and the United States set apart certain lands as a reservation and reserved to the tribes "the exclusive right of taking fish in the streams and lakes, included in said reservation * * *."

Section 3 of the Klamath Termination Act of 1954 required the tribe to draw up a final roll of members living on August 13, 1954, whereupon "the roll of the tribe shall be closed and no child born thereafter shall be eligible for enrollment." 25 USC § 564b. Section 5 required each person named on the final roll "to elect to withdraw from the tribe and have his interest in tribal property converted into money and paid to him, or to remain in the tribe and participate in the tribal management plan * * *." 25 USC § 564d.



Section 14(b) of the Act provided:

> "Nothing in this Act shall abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty." 25 USC § 564m(b).

The questions presented are:

1. Whether treaty rights to hunt, fish and trap on lands set apart as a reservation for an Indian tribe can be exercised by persons who withdrew and "ceased to be members" of the tribe, and by descendants of persons on the final tribal roll who were born after the roll was closed by Act of Congress.

2. Whether an Indian tribe over which federal supervision has been terminated and for which a final roll of members has been prepared by Act of Congress retains "sovereign authority" to enroll future-born persons as members and clothe them with immunity from State fish and game laws while exercising hunting and fishing rights originally secured to the tribe by treaty.

3. Whether such treaty rights can be exercised over lands of the former reservation that were disposed of under an Act of Congress and are no longer held for the exclusive use of the tribe and its members.

## CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED

The constitutional provision involved is the Su-

premacy Clause, Article VI, Clause 2, which is set out in Appendix E, infra 63.

The treaty involved is the Treaty of October 14, 1864, 16 Stat 707, material parts of which are set out in Appendix F, infra 64.

The statute involved is the Klamath Termination Act, 68 Stat 718, 25 USC §§ 564-564x, as amended. Material parts of the Act, including the 1958 amendments, 72 Stat 816, 25 USC § 564w-1, are set out in Appendix G, infra 66.

## STATEMENT OF THE CASE

1. **The material facts.**

a. Under a Treaty of October 14, 1864 between the Klamath and Modoc tribes and the United States, more than one million acres of land in southern Oregon were "set apart as a residence for said Indians, (to be) held and regarded as an Indian reservation * * *." It reserved to the tribes "the exclusive right of taking fish in the streams and lakes, included in said reservation * * *." 16 Stat 707.

In 1954, Congress passed the Klamath Termination Act, 68 Stat 718, 25 USC § 564, whose purpose was

> "* * * to provide for the termination of Federal supervision over the trust and restricted property of the Klamath tribe of Indians consisting of the Klamath and Modoc tribes * * *, and of the individual members thereof, for the distribution of federally owned property acquired or withdrawn for the administration of the affairs of said Indians, and for a termination of Federal services furnished said Indians because of their status as Indians." Section 1, 25 USC § 564.



The Act required the tribe to prepare a roll of all of its members living on August 13, 1954 which, as approved, would be "final for the purposes of this Act." As of that date, "the roll shall be closed and no child born thereafter shall be eligible for enrollment." Section 3, 25 USC § 564b. Upon publication, the rights and beneficial interests in tribal property of persons named on the final roll "shall constitute personal property which may be inherited or bequeathed." Section 4, 25 USC § 564c.

Section 5, 25 USC § 564d, provided that each person named on the final roll would elect to "withdraw from the tribe" and be paid his interest in tribal property in money, or remain in the tribe and participate in a "tribal management plan." All tribal property would be appraised at its fair market value and enough sold to pay the withdrawing members their shares. Except for sharing in the proceeds of tribal claims against the United States,

> "Members of the tribe who receive the money value of their interest in tribal property shall thereupon cease to be members of the tribe * * *." Section 6, 25 USC § 564e(c).

Section 19, 25 USC § 564r, terminated any powers of the tribe under its constitution that were "inconsistent with the provisions of this Act."

After termination,

> "* * * individual members of the tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians and, except as otherwise provided in this Act, all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction." Section 18, 25 USC § 564q(a).

Section 14(b), 25 USC § 564m(b), provided:

> "Nothing in this Act shall abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty."

b. By 1958 the final tribal roll and the appraisal of tribal property were complete, but none of the property had been sold. Nearly 78% of 21,113 enrolled Klamaths had elected to be paid for their interests in tribal property and withdraw from the tribe. 2 US Code and Cong Serv (1958) 3791-3792. See *Klamath and Modoc Tribes v. Maison,* 338 F2d 620 (9th Cir 1964).

In that year, Congress added Section 28, 72 Stat 816, 25 USC § 564w-1, to the Act. Subsection (c) of Section 28, 25 USC § 564w-1(c), provided for a review of the existing appraisal, giving "full consideration



* * * to all reasonably ascertainable elements of land, forest, and mineral values," to determine "the fair market value of such forest units and marsh lands as if they had been offered for sale on a competitive market without limitation on use" between the end of the 85th Congress and the termination date specified in Section 6(b) of the 1954 Act. Those "realization values" were the minimum prices to be charged for land sold to raise money for withdrawing members, and the price paid by a purchaser would be "deemed to represent the full appraised fair market value of the lands." Subsection (b), 25 USC § 564w-1(b). The United States would purchase lands not otherwise disposed of by April 1, 1961 for realization values aggregating not more than $90 million. Subsection (d), 25 USC § 564w-1(d).

Since 1958, land in the reservation has been sold under the Act to private parties and to the United States.

2. **Proceedings in the courts below.**

a. On February 26, 1973 five "withdrawn members of the Klamath Indian tribe" filed this action in the District Court for Oregon, claiming to be "owners" of hunting, fishing and trapping rights within the reservation (R 2-3, see R 8). They alleged that petitioners[1] were applying Oregon's fish and game laws "on the

[1]The Director and Commissioners of the Oregon Game Commission and the Director of the Oregon State Patrol and Oregon Game Enforcement Division (R 3).

ancestral Klamath reservation" (R 4) and sought declaratory and injunctive relief protecting their treaty rights "to hunt, fish and trap within their ancestral Klamath Indian reservation free of Oregon State Game and Fish Regulations" (R 5-6). Jurisdiction of the District Court was based on 28 USC § 1331.

The District Court dismissed the action for failure to state a claim. Infra 61. The Ninth Circuit Court of Appeals reversed the judgment, 493 F2d 564 (*Kimball I,* infra 49), and this Court denied certiorari. 419 US 1019 (1974). The Court of Appeals held that setting apart the land as a residence for the Indians included rights to hunt and trap (as well as to fish) on the reservation (Infra 52-53); those rights, which belonged to "* * * the individual Indians," were not expressly abrogated by the Act, and "at least fishing rights" were preserved for each withdrawn member of the tribe by Section 14(b). It also held that treaty rights can be exercised over all "land constituting [the] ancestral Klamath Indian reservation," including sold-off land now in the National Forest and private land on which hunting, fishing or trapping is permitted. 493 F2d 569-570, and n 9. Infra 59-60.

On remand, the District Court joined the Klamath Indian Game Commission, an alleged regulatory agency of the tribe, as a party (R 289-290), and proceeded to decide two additional issues. It held, in a decision



without precedent, that persons born after the tribal roll was closed on August 13, 1954 could exercise the tribe's rights under the treaty. Finally, it held that the State could not regulate the exercise of those rights. Infra 43.

On November 3, 1976 the District Court entered a judgment granting the plaintiffs declaratory and injunctive relief in accordance with those decisions (R 833-834).

c. Petitioners appealed, seeking reconsideration of the decision in *Kimball I* that withdrawn members could exercise treaty rights and that treaty rights could be exercised over sold-off lands.[2] They also sought review of the District Court's decision extending treaty rights to persons born after August 13, 1954 and prohibiting the State from regulating treaty rights for conservation purposes.

In its decision rendered January 26, 1979 (*Kimball II,* infra 23), the Court of Appeals sustained the State's claim to regulate treaty rights for conservation purposes, but affirmed the judgment in all other

[2]To conform with Ninth Circuit practice, petitioners requested a hearing *en banc* to consider these questions, which had been decided by a panel of the court on the prior appeal. See *Charleston v. United States,* 444 F2d 504, 506 (9th Cir 1971); *Ellis v. Carter,* 291 F2d 270, 273 n 3 (9th Cir 1961). That request was not granted, and they were decided in *Kimball II* under the rule of "the law of the case."

respects.[3] It held that *Kimball I* was "the law of the case" and was not inconsistent with this Court's later decision in *Puyallup Tribe v. Washington Game Dept.*, 433 US 165 (1977) (*Puyallup III*) or its own decision in *United States v. State of Washington,* 520 F2d 676 (9th Cir 1975), *cert den* 423 US 1086 (1976), or with Congressional intent as shown by the history of the 1958 amendments. It affirmed the District Court's far-reaching decision that persons born after the final tribal roll had been prepared could exercise rights under the 1864 treaty without complying with Oregon's fish and game laws.

## REASONS FOR GRANTING THE WRIT

**The Court of Appeals has decided important questions of federal law which have not been, but should be settled by this Court, in a way which probably conflicts with applicable decisions of this Court and substantially interferes with the enforcement of Oregon's fish and game laws.[4]**

## DISCUSSION

**1. The court's decision that persons who withdrew from the tribe or are barred from membership under the Klamath Termination Act can exercise the tribe's treaty rights.**

[3] However, its analysis had changed. The court stated that *Kimball I* was based on an interpretation of the treaty right to fish and the preservation of that right in Section 14(b). Infra 24, 34. This is a doubtful interpretation of the earlier decision. See p 8 supra.

[4] In reviewing the present judgment, the Court will "consider all of the substantial federal questions determined in the earlier stages of the litigation," including those decided in *Kimball I. See Mercer v. Therist,* 377 US 152, 153-154 (1964) *reh den* 377 US 973 (1964); 1B Moore's Federal Practice (2d ed 1974) ¶ 0.404[5.-1] at p 471.



The first important question in this case is whether rights of the Klamath tribe under the Treaty of 1864 to hunt, fish and trap on the reservation can be exercised by persons who ceased to be members or who cannot become members of the tribe under the Termination Act.[5] The Court of Appeals held that they can, on the ground that the Act did not terminate the tribe or limit its membership for purposes other than sharing in tribal property. The tribe retained "sovereign authority" to regulate the exercise of treaty rights and could extend them to persons meeting its own "criteria for membership." Infra 38. Consequently, anyone who is a member under tribal law, including persons who are barred from membership by Act of Congress, can exercise treaty rights that were preserved by Section 14(b) or otherwise.[6]

The question of determining the beneficiaries of Indian tribal rights, which was reserved for future consideration in *Menominee Tribe v. United States,*

[5] The cases have consistently recognized that treaty rights can be exercised only by members of the tribe. See *Puget Sound Gillnetters Ass'n v. U. S. Dist. Court,* 573 F2d 1123, 1129-1130 (9th Cir 1978 (pdg US Sup Ct)); *Dillon v. State of Mont.,* 451 F Supp 168, 175-176 (D Mont 1978); *United States v. Heath,* 509 F2d 16, 19 (9th Cir 1974).

[6] As to withdrawn members, the court in *Kimball I* thought this result was required by *Menominee Tribe v. United States,* 391 US 404 (1967). However, that case concerned only the collective rights of the tribe, not the rights of individuals to participate in the tribe's rights. The Menominee Termination Act contains no provision for withdrawal from the tribe.

391 US 404, 409-410 at n 10 (1967), is one of great importance to relationships between the states and the tribes. Membership in an Indian tribe is subject to the plenary authority of Congress,[7] and Section 19 terminated powers of the Klamath tribe that were inconsistent with the provisions of the Act. This Court should consider the implications of allowing the Klamaths, after termination, to regulate tribal membership in terms inconsistent with those fixed by Congress,[8] and thereby preserve treaty hunting that does not comply with the State's fish and game laws.[9]

a. The court's decision recognizes that continuing membership is essential to sharing in tribal property, Cohen, *Handbook of Federal Indian Law,* (1971 ed) 185, 187; *Gritts v. Fisher,* supra, 224 US 640, 642 (1912); *The Cherokee Trust Funds,* 117 US 288 (1886); *United States v. Heath,* supra, 509 F2d 16, 19 (9th Cir 1974). However, restrictions on tribal membership in

[7] *Gritts v. Fisher,* 224 US 640, 642-643 (1912); *Stephens v. Cherokee Nation,* 174 US 445, 484-486 (1899); *Wallace v. Adams,* 204 US 415 (1907); Cohen, *Handbook of Federal Indian Law,* (1971 ed) 98-100.

[8] See Hobbs, *Indian Hunting and Fishing Rights II,* 37 George Wash. Law Rev. 1251, 1267 (1969). Under appropriate internal rules, a tribe can adopt as members persons who belong to other tribes, *Smith v. Bonifer,* 154 Fed 883, 886 (CC Or 1907), *aff'd* 166 Fed 846 (CCA 9, 1909), and whites, *Red Bird v. United States,* 203 US 76 (1906). Adopted members enjoy all of the rights and privileges of those whose membership is based on birth. *Cherokee Nation v. Journeycake,* 155 US 196 (1894); *Red Bird v. United States,* supra, 203 US 76 (1906).

[9] Until *Kimball I,* the courts had held that withdrawn members of the Klamath tribe could not exercise treaty rights, and that treaty rights did not apply to sold-off land. *Klamath and Modoc Tribes v. Maison,* supra, 338 F2d 620 (9th Cir 1964); *State v. Borjorcas,* 14 Or App 538, 513 P2d 813, 514 P2d 566 (1973).



the Klamath Termination Act are not limited to sharing tribal property. Their language is unqualified, and they should be applied, as in other cases of exclusion from an Indian tribe, to bar the immunities, privileges and responsibilities of tribal membership. *Halbert v. United States,* 283 US 753, 762-763 (1931); *Gritts v. Fisher,* supra, 224 US 640, 642 (1912); *Oakes v. United States,* 172 Fed 305 (CCA 8, 1909).

b. The conclusion of the Court of Appeals that the Act applies only to sharing tribal property puts damaging limitations on the administration of Oregon's fish and game laws. The old reservation covers a million acres of land in southern Oregon, and the immediate result is to limit the State's authority over Indian hunting throughout that huge area to regulation for conservation purposes, leaving a large gap in its system of fish and game management. See *Settler v. LaMeer,* 507 F2d 231, 237 (9th Cir 1974). Such limited regulation is of uncertain scope, see *Antoine v. Washington,* 420 US 194, 207 (1975), and is ineffective in this case because the effect on the deer herds of viciously destructive hunting practices engaged in by the Klamaths[10] is difficult to measure (R 559). The welfare of all of the people of Oregon—Indians and non-Indians alike—requires, as far as possible, the uniform application of the State's program of fish and game management.

[10] See R 557-569, 636, 642, 646, 650.

The problem is urgent, because the Court of Appeals has extended treaty rights to persons born since the tribal roll was closed, an indefinite and growing population who will become increasingly remote from conditions of life and society that are reflected in Section 14(b). It was a matter of concern to Congress in 1954 that with the passage of time it would become difficult to identify persons who are entitled to exercise treaty rights.[11] That concern was justified. A significant enforcement problem on the reservation has been to identify and regulate the activities of non-Indians and Indians from other tribes who hunt with the Klamaths (R 635, 639-642, 646-650, 660-661, 664-667).

c. The construction of the Klamath Termination Act adopted by the Court of Appeals does not in any case support its judgment. Indian treaties were made with the tribes and conferred no rights on individuals, *Sac & Fox Indians v. Sac & Fox Indians,* 220 US 481 (1911). Treaty rights belong to and are property of the tribe, *Menominee Tribe v. United States,* supra, 391 US 404, 412 (1968), not its individual members. *Sizemore v. Brady,* 235 US 441, 446-447 (1914); *Whitefoot v. United States,* 293 F2d 658, 663 (Ct Cl 1961) *cert den* 369 US 818 (1962); *United States v. State of Washington,* 520 F2d 676, 688 (9th Cir 1975), *cert den* 423 US 1086 (1976). "The right of the individual Indian is, in effect, a right of participation similar in some respects to the rights of a stockholder in the property of a corporation." Cohen, *Handbook of Federal Indian Law,* supra, (1971 ed) 183. Consequently, a statutory termination or denial of membership which applied only to sharing tribal property would prevent persons excluded by the law from participating in the tribe's treaty rights.

[11] See Joint Hearings before Subcommittees of the Committees on Interior and Insular Affairs on S.2745 and H.R. 7320 (Feb 1954, 83 Cong., 2d Sess) at pp 254-255.



The record shows that this was Congress' understanding of the matter, and that it did not intend the tribe's treaty rights to be exercised by persons whose membership in the tribe was terminated or barred by the Act. When the 1958 amendments were under consideration, the Acting Secretary of the Department of the Interior advised the Senate Subcommittee on Indian Affairs, which was considering the legislation, that withdrawn members and persons born after August 13, 1954 could not exercise the tribe's rights under the treaty to hunt and fish on the reservation (R 586-587).[12] See also the Memorandum of the American Law Division of the Library of Congress to the same committee (R 587-588)[13] and the published opinion of

[12] Hearings before Senate Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs on S.2047 and S.3051 (Feb 1958, 85 Cong., 2d Sess) at pp 491-492. That this is evidence of legislative intent, see *Seymour v. Superintendent,* 368 US 351, 356-357 (1962).

[13] 1958 Hearings at 492-493.

the Interior Department reported in 62 ID 186, 202-203 (1955).[14] With that advice, Congress adopted legislation requiring a new appraisal of tribal property that would produce prices reflecting every identifiable value of land that was sold to pay the shares of withdrawing members.

d. The Court of Appeals believed that a decision denying these claims would "abrogate" treaty rights of the tribe or its members, contrary to Section 14(b) and P.L. 280, 18 USC § 1162. However, neither statute changes existing treaty rights, and the court's decision, by extending treaty rights to persons who by Act of Congress are not members of the tribe, does not preserve rights under the Treaty of 1864, but expands them. It should be of concern to this Court, because it impairs the State's authority to administer its wildlife program and subjects broad areas of the State to destructive and largely unregulated hunting.

2. **The court's decision that treaty rights can be exercised over reservation land after it has been sold to others under an Act of Congress and is no longer held for the exclusive use of the tribe or its members.**

This Court should also review the Court of Appeals' decision that treaty rights which applied to lands that were set aside for the Indians' use and occupation can

[14]This consequence of withdrawal was explained to members of the tribe before they decided whether to withdraw (R 589). 1958 Hearings at 30.



be exercised over those lands after they have been sold to pay withdrawing members of the tribe. That conclusion, which was based on the view that the State's position would "abrogate" rights that were preserved by the Act, subjects broad areas of private and Forest Service land in southern Oregon to treaty hunting. The resulting limitation on law enforcement upon those lands and uncertainty over the rights and duties of their owners are questions of public concern that this Court should resolve.

a. There are two questions: The first is whether Congress intended sold-off lands to remain subject to those treaty rights, whether as part of the reservation or otherwise. See *Puyallup Tribe v. Washington Game Dept.,* supra, 433 US 165, 173-175 (1977) (*Puyallup III*). Evidence of that intent is found in the Act, which provides for sales of land on the reservation to private and public purchasers for prices that reflect every element of value, without "limitation on use." Treaty rights are servitudes in the nature of easements, *United States v. Winans,* 198 US 371, 382, 384 (1905), and such sales compensated the tribe for its entire interest in the land, thereby improving the price and satisfying the policy of eliminating burdens on the purchasers' title.

Congress was advised of this consequence of its program. When the 1958 amendments were before the

Senate Subcommittee on Indian Affairs, the Assistant Legislative Counsel to the Department of the Interior testified, and thereafter prepared advice for the Subcommittee, that Section 14(b) was not intended to change or expand treaty rights, and "under the terms of the treaty an individual Indian has no hunting or fishing rights * * * on any unallotted tribal land after it is sold * * *. We believe that is the way the treaty would have been construed" (R 574-579, 584-587).[15] A memorandum to the Subcommittee prepared by the American Law Division of the Library of Congress reached the same result (R 579-580, 587-588).[16] The conclusion should follow that treaty rights preserved by the Act apply only to lands that were not sold to others in the course of paying withdrawing members their shares of tribal property.

b. Second, the decision is inconsistent with this Court's decision in *Puyallup Tribe v. Washington Game Dept.,* supra, 433 US 165 (1977) (*Puyallup III*), which held that a provision of the treaty of Medicine Creek for the "exclusive use" of reservation land by the tribe did not entitle its members to fish on sold-off land, which they no longer held for their exclusive use. The tribe had only the right, under a different treaty

[15] Hearings before Senate Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs on S.2047 and S.3051 (Feb 1958, 85 Cong., 2d Sess.) at pp 397-398, 491-492.

[16] 1958 Hearings at 493.



provision, to fish in common with others at "all usual and accustomed grounds and stations," a right which was not tied to land on the reservation. It was that latter provision of the treaty which "continues to protect their right to fish on deeded lands within the confines of the reservation." 433 US at 174, n 13. The Klamath treaty contains no such provision.

It is the result of *Puyallup III,* contrary to the decision below, that a sale of reservation land extinguishes treaty rights that have previously attached to it. As applied to this case, that principle does not abrogate rights under the Treaty of 1864, because, as the Interior Department told Congress, it simply reflects the nature of those rights. As in the case of tribal membership, the decision of the Court of Appeals does not preserve, but expands rights under the 1864 Treaty.

The question, which has not been considered by this Court except in *Puyallup III,* is an important one. Whether treaty rights can be exercised over reservation land which is sold for its full value to others is an important question that affects the interests of purchasers of such lands as well as the administration of the State's wildlife program. Vast areas of western land owned by the federal government and by private parties are involved, and the issue should be resolved by this Court.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES H. CLARKE
Counsel for Petitioners

Dated April 6, 1979

James A. Redden
Attorney General of Oregon

Walter L. Barrie
Solicitor General

Beverly B. Hall
Assistant Attorney General
Of Counsel

## APPENDICES

## Appendix A

(Entered January 26, 1979)

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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| CHARLES E. KIMBALL, STEPHEN L. LANG, ALLAN LANG, LEONARD O. NORRIS, JR., JAMES KIRK, and the KLAMATH INDIAN GAME COMMISSION, an agency of the KLAMATH INDIAN TRIBE, Plaintiffs-Appellees, v. JOHN D. CALLAHAN, ALLAN L. KELLY, PAT J. METKE, FRANK A. MOORE, and JAMES W. WHITTAKER, each individually and as a member of the STATE GAME COMMISSION OF THE STATE OF OREGON; JOHN McKEAN, individually, and as director of the OREGON GAME COMMISSION; and HOLLY HOLCOMB, individually and as director of the OREGON STATE PATROL AND OREGON GAME ENFORCEMENT DIVISION, Defendants-Appellants. | No. 77-2628 OPINION |

Appeal from the United States District Court
for the District of Oregon

Before: GOODWIN and ANDERSON, Circuit Judges, and JAMESON,* District Judge.

JAMESON, District Judge:

*The Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

Appellants, the members and directors of the Oregon State Game Commission and the director of the Oregon State Patrol and Oregon Game Enforcement Division, have appealed from a judgment declar-

ing that appellees, five Klamath Indians and the Klamath Indian Game Commission, and the members of the Klamath Indian Tribe are "entitled to the rights, privileges and immunities afforded under the Treaty of October 14, 1864, between the Klamath Indian Tribe and the United States to hunt, trap and fish within their ancestral Klamath Indian Reservation as it existed at the time of termination in 1954, free from Oregon State game and fish regulations"; and enjoining appellants from "asserting hunting, fishing and trapping regulations against members of the Klamath Indian Tribe while hunting, fishing, and trapping on the former Klamath Indian Reservation as it existed at the time of termination in 1954". The United States has filed an amicus brief in support of appellees.

## I. BACKGROUND

The treaty of October 14, 1864, 16 Stat. 707, which created the Klamath and Modoc Reservation, provided that the reservation "shall, until otherwise directed by the President of the United States, be set apart as a residence for said Indians, [and] held and regarded as an Indian reservation . . ." The treaty secured for the Indians "the exclusive right of taking fish in the streams and lakes included in said reservation . . . ." On a prior appeal this court interpreted this provision to include also the right to hunt and trap on the reservation. *Kimball v. Callahan,* 493 F.2d 564, 566 (9 Cir.) *cert. denied,* 419 U.S. 1019 (1974). (*Kimball I*). See also *Klamath and Modoc Tribes v. Maison,* 139 F.Supp. 634, 637 (D. Or. 1956).



In 1954 Congress passed the Klamath Termination Act, which became fully effective in 1961. Act of August 13, 1954, 25 U.S.C. §§ 564-564x. The purpose of the Act was to terminate federal supervision over the trust and restricted property of the Klamath Tribe of Indians, to dispose of federally owned property acquired or withdrawn for the administration of the Indians' affairs, and to terminate federal services furnished the Indians because of their status as Indians. 25 U.S.C. § 564.

Pursuant to the Termination Act the tribal roll was closed on August 13, 1954. No child born thereafter was eligible for enrollment. 25 U.S C. § 564b. Each person whose name appeared on the final roll had to elect either to withdraw from the tribe and receive the money value of his interest in tribal property or to remain in the tribe and participate in a nongovernmental tribal management plan. §564d(a)(2). All tribal property was to be appraised and a sufficient amount of it sold to pay those members who elected to withdraw from the tribe and have their interest converted into money. § 564d(a)(3). Members who received the money value of their interests in tribal property "thereupon cease[d] to be members of the tribe . . . ." § 564e(c). The Act expressly provided, however, that nothing in the Act "shall abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty". § 564m(b).

In February, 1973, the appellees, five Klamath Indians who either personally withdrew or whose ancestors withdrew from the Tribe and had their interest in tribal property converted into money and

paid to them, filed suit seeking a declaration of their right to hunt, trap and fish within their ancestral Klamath Indian Reservation free of Oregon fish and game regulation, pursuant to the Treaty of October 14, 1864. In a memorandum opinion dated March 15, 1973, the district court granted defendants' motion to dismiss for failure to state a claim. This court reversed. *Kimball v. Callahan, supra.* (Kimball I)[1] Relying on *Menominee Tribe of Indians v. United States,* 391 U.S 404 (1968), we held that the plaintiffs who elected to withdraw from the Tribe pursuant to the Klamath Termination Act nevertheless retained treaty rights to hunt, fish, and trap, "free of state fish and game regulations on the lands constituting their ancestral Klamath Indian Reservation, including that land now constituting United States national forest land and that privately owned land on which hunting, trapping, or fishing is permitted". 493 F.2d at 569-70.

Following remand a supplemental complaint was filed in which the Klamath Indian Game Commission was joined as a plaintiff. In an opinion entered on September 10, 1976, the district court first recognized that this court in *Kimball I* found jurisdiction and "that the Indians' rights to hunt, fish and trap on their ancestral reservation are exclusive", and concluded that this court's holdings on these issues were the "law of the case". The district court held further (1) that the rights of Indians to fish, hunt, and trap, free of state regulations, extended to the descendants of persons on the final tribal roll; and (2) that the court had no

[1]The district court also questioned whether it had jurisdiction under 42 U.S.C. § 1983 or 28 U.S.C. § 1331. This court found jurisdiction under § 1331.



authority to approve the plaintiffs-appellees' offer to permit state regulation under specified conditions for conservation purposes. The court did suggest that the defendants-appellants approve the Tribe's proposal or negotiate with representatives of the Klamath Indians in an effort to promulgate mutually satisfactory regulations.

Since the filing of the district court's opinion, the appellees have filed a motion for leave to file as an appendix to their brief their "Klamath Tribal Wildlife Management Plan," to which the district court referred in its opinion. Appellants oppose this motion.

## II. CONTENTIONS ON APPEAL

Appellants do not seek review of the jurisdiction issue; nor do they "seek reconsideration of the conclusion reached in *Kimball I* that rights of the Klamath Tribe under the treaty of 1864 survived the Klamath Termination Act". They argue, however, that the "law of the case" does not apply to the issues raised on this appeal. They contend that:

(1) Tribal rights can be exercised only by persons on the final tribal roll of August 13, 1954 who did not withdraw under the Klamath Termination Act, and withdrawn members cannot exercise hunting, fishing, and trapping rights under the 1864 treaty.

(2) Persons born after August 13, 1954 are not entitled to exercise hunting, fishing and trapping rights.

(3) Treaty rights cannot be exercised on land disposed of to the federal government and private purchasers.

(4) The State can "directly regulate the exercise of treaty rights by members of the Klamath Tribe for conservation purposes".

## III. RECONSIDERATION OF KIMBALL I

### (a) Law of the Case

Preliminary to a consideration of the effect of specific holdings in *Kimball I,* we note that under the "law of the case" doctrine one panel of an appellate court will not as a general rule reconsider questions which another panel has decided on a prior appeal in the same case. As the court stated in *Lehrman v. Gulf Oil Corporation,* 500 F.2d 659, 662-63 (5 Cir. 1974), *cert denied,* 420 U.S. 929 (1975):

> This laudable and self-imposed restriction is grounded upon the sound public policy that litigation must come to an end. An appellate court cannot efficiently perform its duty to provide expeditious justice to all "if a question once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal".[2]

While the "law of the case" doctrine is not "an inexorable command", the prior decision of legal issues should be followed on a later appeal "unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice". *White v. Murtha, supra,* 377 F.2d at 431-32.[3]

[2]Citing *White v. Murtha,* 377 F.2d 428, 431 (5 Cir. 1967).

[3]See also *Otten v. Stonewall Ins. Co.,* 538 F.2d 210, 212-13 (8 Cir. 1976).



Appellants contend that *Kimball I* is inconsistent with two subsequent controlling decisions: this court's decision in *United States v. Washington,* 520 F.2d 676 (9 Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976), and the Supreme Court's decision in *Puyallup Tribe, Inc. v. Department of Game,* 433 U.S. 165 (1977) (*Puyallup III*). They also argue that evidence of the legislative history of 1958 amendments to the Klamath Termination Act which was not before this court on the prior appeal, shows Congress intended the Klamath Termination Act to terminate the treaty hunting, fishing, and trapping rights of those Indians who withdrew from the Tribe pursuant to the Termination Act. We cannot agree with either contention.

### (b) *United States v. Washington*

In *Kimball I* the court held that a Klamath Indian possessing treaty rights to hunt, fish and trap on the former reservation at the time of the Act's enactment retained those rights even though he relinquished his tribal membership pursuant to the Act. 493 F.2d at 569. Appellants argue that the basis of this holding was the court's conclusion that the Klamath treaty rights belonged to "individual Indians". This, they contend, is inconsistent with this court's decision in *United States v. Washington, supra,*[4] as well as the

[4]In *United States v. Washington,* the court was concerned with an apportionment by the district court of the opportunity to catch fish between treaty Indian tribes and others under treaties which gave the tribes the right to fish at all usual and accustomed grounds and stations, in common with all citizens of the Territory. The court rejected the State's argument that the Indian negotiators intended to secure for each member of the tribe the right to compete for fish on equal terms *as an individual* with each individual settler. Because individual Indians had no individual title to property but participated in the communal rights of the tribe, the court held that the "in common with" provision of the treaties entitled the treaty Indians to an

*(Continued on following page)*

Court of Claims' decision in *Whitefoot v. United States,* 293 F.2d 658 (Ct.Cl. 1961), *cert. denied,* 369 U.S. 818 (1962),[5] that treaty rights are communal in nature and are owned by the tribe, not by the members who exercise them. Neither of these cases, however, was concerned, as was *Kimball I,* with the tribal rights of individual Indians upon the termination of a tribe.

The court in *Kimball I* did not base its decision that withdrawn tribal members retained their treaty rights to hunt and fish upon any rights to tribal property. On the contrary, the court expressly recognized that withdrawn members relinquished all interests in tribal property. The court's decision was based on the express provision in the Termination Act that nothing in the Act "shall abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty". Moreover, the court's statement that treaty rights to hunt and fish are rights of the individual Indian[6] must be understood within the context of the two cases cited in its support, *McClanahan v. Arizona State Tax Comm'n,* 411 U.S 164, 181

*(Continued from previous page)*

opportunity to catch one-half of all the fish which, absent the fishing activities of other citizens, would pass their traditional fishing grounds. 520 F.2d at 688.

[5] In *Whitefoot v. United States,* the United States built a dam across the Columbia River which inundated certain usual and accustomed fishing locations of the Yakima Nation. The plaintiffs, enrolled members of the Yakima Nation who used these sites, sued the United States for the taking of fishing rights which they claimed as their individual property. The court held that the use of accustomed fishing places reserved by the Yakimas by treaty was a tribal right for adjustment by the Tribe. The fact that certain Indians by tribal custom had been allowed to have sole use of a particular fishing spot gave that individual no property rights against either the Tribe or the United States. 293 F.2d at 663. Although we conclude *infra* that *Kimball I* is not inconsistent with *Whitefoot v. United States,* we note in passing that that case is not binding precedent upon this court.

[6] 493 F.2d at 568-69, n. 9.



(1973), and *Mason v. Sams,* 5 F.2d 255, 258 (W.D. Wash. 1925).

In *McClanahan,* the State of Arizona attempted to impose its personal income tax on a reservation Indian whose entire income derived from reservation sources. In upholding the tax the Arizona court focused not on whether the tax infringed upon the appellant's rights as an individual Navajo Indian, but on whether the tax infringed upon the rights of the Navajo Tribe to be self-governing. *McClanahan v. Arizona State Tax Comm'n,* 484 P.2d 221, 223 (1971). The United States Supreme Court rejected the notion that it was irrelevant whether the state income tax infringed upon appellant's rights as an individual Navajo Indian. Recognizing that when Congress has legislated on Indian matters, it has most often dealt with the tribes as collective entities, the Court reasoned that those entities were composed of individual Indians and the legislation conferred individual rights. The court held that appellant's rights as a reservation Indian were violated. 411 U.S at 181.

In *Mason* the district court considered whether in light of treaty provisions with the Quinaielt Tribe which the court construed as giving the Quinaielt Indians the exclusive right of fishing upon their reservation, the Commissioner of Indian Affairs could enforce regulations made by him without tribal consent which required the plaintiffs, members of the Quinaielt Tribe, to pay a royalty for the fish they caught in reservation streams to be used by the Tribe for the care of the aged and destitute members of the Tribe and for general agency purposes. Because a

limited number of fishing locations were available, not all tribal members were assigned fishing locations. Failure to sell fish to licensed buyers and to pay the royalty could result in imposition of a fine and withdrawal of fishing privileges for a whole season. Although the treaty giving exclusive fishing rights to the Quinaielts was with the Tribe, the court held that the right of taking fish was a right common to the members of the Tribe and that "a right to a common is the right of an individual of the community". 5 F.2d at 258.

From *Mason* it is clear that an individual Indian enjoys a right of user in tribal property derived from the legal or equitable property right of the tribe of which he is a member. See also F. Cohen, *Handbook of Federal Indian Law* 185 (1945). This was the basis for the court's statement in *Kimball I.* Prior to the Termination Act, the Klamath Tribe held treaty hunting, fishing, and trapping rights within its reservation in which the individual members of the Tribe held rights of user. The Termination Act did not affect those rights. That an individual member withdrew from the tribe for purposes of the Termination Act did not change his relationship with the tribe as to matters unaffected by the Act, e.g., treaty hunting, fishing, and trapping rights.[7] We find nothing in *United States v. Washington* and *Whitefoot v. United States* to the contrary.

[7]Congress recognized that local officials would have difficulty in later years identifying those who had hunting and fishing rights. Joint Hearings, Subcommittees of the Committee on Interior and Insular Affairs, 83d Cong., 2d Sess., Pt. 4, on S. 2745 and H.R. 7320, at 253-54.



(c) *Puyallup III*

In *Kimball I* this court held that the appellees could exercise their treaty hunting, fishing and trapping rights on former reservation lands which had been sold pursuant to the Termination Act.[8] Appellants contend this holding is inconsistent with the Supreme Court's subsequent decision in *Puyallup Tribe, Inc. v. Department of Game, supra* (*Puyallup III*), which they read as sustaining this court's decision in *Klamath and Modoc Tribes v. Maison,* 338 F.2d 620 (9 Cir. 1964), limiting the exercise of treaty hunting, fishing, and trapping rights to unsold lands on the reservation.[9] We do not find *Kimball I* inconsistent with *Puyallup III.*

In *Puyallup III* the Puyallup Tribe asserted an exclusive right to take steelhead fish which passed through its reservation. The State of Washington sought to regulate the Puyallup Indians' on-reservation exercise of their treaty fishing rights in the interest of conservation.[10] The Tribe argued that a treaty which provided that the Puyallup Reservation was to be "set apart, and, so far as necessary, surveyed and marked out for their exclusive use" and that no

[8]The appellees (appellants in *Kimball I*) did not seek *exclusive* rights to hunt, fish, and trap on the transferred lands, nor did the court hold or intimate an opinion on the treaty rights of the Indians vis-a-vis private Oregon landowners. 493 F.2d at 569, n. 10, and 570, n. 11.

[9]In *Kimball I* the court stated that this holding in *Klamath and Modoc Tribes v. Maison* was incorrect in light of *Menominee Tribe v. United States,* 391 U.S. 404 (1968). 493 F.2d at 566, n. 4.

[10]In *Puyallup Tribe v. Washington Game Department,* 391 U.S. 392 (1968) (*Puyallup I*), and *Washington Game Department v. Puyallup Tribe,* 414 U.S. 44 (1973) (*Puyallup II*), the Supreme Court held that the State of Washington could regulate the Puyallup Indians' off-reservation exercise of their treaty fishing rights in the interest of conservation.

"white man [was to] be permitted to reside upon the same without permission of the tribe and the superintendent or agent,"[11] amounted to a reservation of a right to fish free of State interference on the Puyallup River. The Supreme Court found that such an interpretation clashed with the subsequent history of the reservation[12] and that neither the Tribe nor its members continued to hold the Puyallup River fishing grounds for their exclusive use. The tribal members' treaty right to fish "at all usual and accustomed grounds and stations," however, continued "to protect their right to fish on ceded lands within the confines of the reservation". 433 U.S. at 174, n. 13.

Because the treaty with the Klamaths did not contain a similar treaty provision, appellants argue that there is no basis for limiting state regulation of Indian hunting, fishing and trapping on the sold-off reservation lands to conservation measures. The Treaty of October 14, 1864, however, secured for the Indians "the exclusive right of taking fish in the streams and lakes in said reservation . . ." The Klamath Termination Act expressly provided that nothing in the Act would abrogate the fishing rights secured by the treaty. As this court held in *Kimball I,* these two provisions protect the exercise of those treaty rights on the lands constituting the ancestral Klamath Indian Reservation. We find nothing con-

[11] Treaty of Medicine Creek, 10 Stat. 1132, 1133 (1854).

[12] Pursuant to two acts of Congress, the Puyallups had alienated all but 22 acres of their 18,000 acre reservation. None of the remaining 22 acres abutted on the Puyallup River, where tribal members fished and neither the Tribe nor its members continued to hold the Puyallup River fishing grounds for their exclusive use. 433 U.S. at 174. The Supreme Court expressed no opinion on the continued existence of the Puyallup Reservation, a matter which had been in dispute. 433 U.S. at 173, n. 11.



trary to this conclusion in *Puyallup III.* Both cases recognize that the transfer of reservation lands and modification of reservation boundaries may affect treaty rights by converting the exercise of those rights from exclusive to non-exclusive.[13] The Klamaths do not claim an *exclusive* right to hunt, fish and trap on the lands sold pursuant to the Termination Act. See *supra,* n. 8.

### (d) Legislative History of Termination Act and 1958 Amendment

In 1958 Congress amended the 1954 Termination Act to prevent potential destruction from overharvesting of tribal forest lands which were to be sold to pay withdrawing tribal members the cash value of their interest in tribal property. Act of August 23, 1958, P.L. No. 85-731, 72 Stat. 816 (codified at 25 U.S.C. § 564w-1). The American Law Division of the Library of Congress submitted a report during the hearings on the bill which concluded that withdrawn tribal members would lose their treaty hunting and fishing rights and that reservation lands sold pursuant to the Termination Act would not be subject to the treaty rights of the Indians. Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 85th Cong., 2d Sess., Pt. 2, on S. 2047 and S. 3051, at 492-93 (Senate Hearings) (R. 587-88). In a letter to the Subcommittee chairman, the Acting Secretary of Interior took a

[13] In *Puyallup III,* no exclusive fishing rights remained, (see *supra,* n. 12). In *Kimball I* the court recognized that exclusive hunting and fishing rights survived on that portion of the former Klamath Indian reservation which was not transferred pursuant to the Termination Act, 493 F.2d at 569-70; but noted that appellants "do not seek exclusive rights . . . on land transferred pursuant to the Termination Act". *Id.* at 570, n. 11.

similar position. Senate Hearings, at 397-98, 491-92 (R. 584-87); see also 62 I.D. 186, 202-03 (1955). Appellants claim this legislative history shows Congress did not intend that withdrawn tribal members should retain their treaty hunting, fishing, and trapping rights.

In concluding that withdrawn tribal members retained these rights, the court in *Kimball I* relied in part upon legislative history of the 1954 Termination Act. Recognizing that treaty obligations existed, Senator Watkins suggested that the Government "buy out" the Indians' hunting and fishing rights rather than preserve them after termination. The court found it telling that Congress did not heed this suggestion. *Kimball I,* 493 F.2d at 568-69, n. 9; see also Joint Hearings, Subcommittees of the Committee on Interior and Insular Affairs, 83d Cong., 2d Sess., Pt. 4, on S. 2745 and H.R. 7320, at 245-55.

Other portions of the legislative history of the 1958 amendments indicate that the Subcommittee members themselves were not certain what effect, if any, the Termination Act had upon the tribal treaty rights. Senate Hearings, at 397-98, 491-93 (R. 584-87). The Acting Secretary of Interior also recognized that different interpretations of its effect were possible, and advised Congress to clearly state its intentions. Letter to Hon. Richard L. Neuberger, Senate Hearings, at 491 (R. 586-87). Congress did not do so. The 1958 amendments to the Termination Act related solely to preservation of tribal lands as forests after their sale. If Congress intended the Termination Act to abrogate the Klamaths' treaty rights, it did not so



indicate. As the Court recognized in *Menominee Tribe of Indians v. United States,* 391 U.S at 413, " 'the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress' ".

We conclude that the decision in *Klamath I* that withdrawn tribal members retained their treaty rights to hunt, fish, and trap on the lands constituting their ancestral Klamath Indian Reservation, including land constituting United States forest lands and privately owned land on which hunting, fishing and trapping is permitted, is the "law of the case".

## IV. EXERCISE OF TREATY RIGHTS BY DESCENDANTS

Appellants' contention that persons born after August 13, 1954, are not entitled to exercise treaty hunting, fishing, and trapping rights rests upon two points: (1) the Klamath Termination Act closed the tribal roll as of August 13, 1954 and expressly provided that children not alive on that date could not subsequently be included on that roll, 25 U.S.C. § 564b; and (2) to share in tribal property, a participant ordinarily has to have tribal membership status in his own right, not through his ancestors. This question was not decided by *Kimball I.*

Appellants' argument is based upon the premise that the tribal roll provided for by the Termination Act was final for purposes of determining who could exercise tribal treaty rights. We reject that premise. Although the Act terminated federal supervision over trust and restricted property of the Klamath Indians, disposed of federally owned property, and terminated federal services to the Indians, it specifically contem-

plated the continuing existence of the Klamath Tribe. It did not affect the power of the tribe to take any action under its constitution and bylaws consistent with the Act. § 564r. The Klamaths still maintain a tribal constitution and tribal government,[14] which among other things establishes criteria for membership in the tribe.[15] The tribal roll created by the Act was for purposes of determining who should share in the resulting distribution of property. *Kimball I* held that the Act did not abrogate tribal treaty rights of hunting, fishing, and trapping. Neither did the Act affect the sovereign authority of the Tribe to regulate the exercise of those rights. The district court properly held that the Termination Act did not limit treaty hunting, fishing and trapping rights to persons on the 1957 final tribal roll, but that those rights also extended to the descendants of persons on the final roll.

## V. STATE REGULATION OF TREATY RIGHTS FOR CONSERVATION PURPOSES

In holding that off-reservation fishing may be

[14]This is clear from Plaintiffs' Response To Defendants' Request For Production (R. 321) and Plaintiffs' Answers To Defendants' Interrogatories (R. 336). Charles Kimball, one of the plaintiffs who withdrew from the Tribe pursuant to the Termination Act, is also a member of the Klamath Indian Game Commission. *Id.* at 342.

[15]Although Congress has the ultimate authority to determine tribal membership, *Adams v. Morton,* 581 F.2d 1314, 1320 (9 Cir. 1978), petition for cert. filed, 47 L.W. 3423 (1978), we conclude that here it determined tribal membership only for purposes of distributing property pursuant to the Termination Act. Compare *Gritts v. Fisher,* 224 U.S. 640, 648 (1912), in which the Supreme Court held that Congress through its administrative control over the tribal property of tribal Indians had the power to reopen a tribal roll which it had closed by prior legislation, thereby making children born after the initial closing date eligible for receiving allotments and participating in the distribution of the remaining lands and funds of the tribe.



regulated by the State for conservation purposes, the Court in *Puyallup I* said:

> The right to fish "at all usual and accustomed" places may, of course, not be qualified by the State, even though all Indians born in the United States are now citizens of the United States. . . . But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians. 391 U.S. at 398

In *Puyallup II* the Court held that the State of Washington's regulation barring net fishing of steelhead trout discriminated against the Indians and remanded the case for determination of a fair apportionment between Indian net fishing and non-Indian sports fishing. 414 U.S. at 48-49. In *Puyallup III* the Court found that the state court on remand from the decision in *Puyallup II,* had conducted a trial and from expert testimony and exhibits had applied a proper standard of conservation necessity and fashioned appropriate relief. 433 U.S. at 177.

*Antoine v. Washington,* 420 U.S. 194, 207 (1975), applied the rule set forth in *Puyallup I, supra,* with respect to land on a former Indian reservation which had been ceded to the Government. The Court said in part: "The 'appropriate standards' requirement means that the State must demonstrate that its regulation is a reasonable and necessary conservation measure [citing *Puyallup II* and *Tulee v. Washington,* 315 U.S. 681, 684 (1942)], *and* that its application to the Indians is necessary in the interest of conservation."

The district court in its opinion noted that appellees "do not seek to exercise their treaty rights on land sold to private owners who prohibit hunting, fishing, and trapping on that land"; nor "do they seek to enforce exclusive rights on the remaining land, most of which is owned by the United States Government". The court referred to conditions under which appellees were willing to permit State regulation[16] and found that these conditions appeared "to conform with the current principles of State regulation of off-reservation fishing rights set forth in *United States v. Washington,* 520 F.2d 676 (9th Cir. 1975), and *Sohappy v. Smith,* 302 F.Supp. 899 (D. Or. 1969)".

The court also noted that the General Council of the Klamath Tribe had recently approved comprehensive regulations for the hunting of game by Klamath Indians on the former Klamath Indian Reservation, which provided for joint regulation with State agencies. While it found their objectives commendable, the court concluded that it had no authority to judicially approve the proposals. The court expressed the hope that the Oregon Fish and Wildlife Commission would approve the proposals; or if the Commission were unable to approve all of them, that the Commission

[16]The conditions as set forth in the district court's opinion read:

1. The specific statute or regulation is required to prevent demonstrable harm to the actual conservation of the game or fish, *i.e.*, it is essential to the perpetuation of a particular species of game or fish.

2. The measure is appropriate to its purpose.

3. Klamath Indian tribal regulation for enforcement is inadequate to prevent demonstrable harm to the actual conservation of the game and fish.

4. The conservation required cannot be achieved to the full extent necessary by restriction of hunting, fishing and trapping by non-treaty sportsmen.



would meet with representatives of the Klamath Indians to promulgate mutually satisfactory regulations.

Appellees recognize that the State of Oregon has authority to reasonably regulate the exercise of their treaty hunting, fishing and trapping rights for conservation purposes.[17] The parties disagree with respect to (1) the scope of the State's authority and (2) whether this court should decide upon appropriate regulations or remand to the district court for its initial determination. Appellees contend that this court "should adopt limitations on state conservation authority which secures the right of Klamath Indians to exercise their treaty rights while providing adequate protection for reservation wildlife". Both appellees and the United States as *amicus curiae* take the position that the extent of state regulation presents legal issues which can be resolved by this court on this appeal.

Appellants urge a remand to the district court for development of a factual record which would serve as a basis for establishing regulations within the scope of the State's right to regulate the Indians' treaty rights. We agree with the State that a factual record should be developed in the district court, as was done on remand in *Puyallup II.* In the event the parties are unable to agree upon mutually satisfactory regulations,[18] it will be necessary for the district court to

[17]Appellees stress the fact that they are not seeking exclusive rights to hunt, fish and trap on transferred land, stating that since "virtually all of the Indian lands of the former reservation have now been transferred there remains no exclusive hunting, fishing, and trapping on the Klamath Indian Reservation".

[18]We do, however, urge the appropriate State officials, as did the district court, to meet with representatives of the Klamath Indians in an effort to promulgate mutually satisfactory regulations for the management of the fish and game resources on the ancestral reservation lands.

determine the scope of the State's authority and formulate appropriate standards in the light of the evidence presented and the guidelines contained in *Puyallup I, II,* and *III, supra; Antoine v. Washington, supra; United States v. Washington, supra; Sohappy v. Smith, supra;* and *Settler v. Lameer,* 507 F.2d 231 (9 Cir. 1974).

## VI. CONCLUSION

We conclude that (1) *Klamath I* is the law of the case in its holding that members of the Klamath Tribe who withdrew pursuant to the Klamath Termination Act retain their treaty rights to hunt, fish, and trap on the former Klamath Reservation; (2) the treaty hunting, fishing, and trapping rights survived the Klamath Termination Act for all members on the final tribal roll and their descendants; (3) the State of Oregon has authority, under appropriate standards to regulate treaty fishing, hunting and trapping rights on the former Klamath Indian Reservation for conservation purposes; and (4) in the event the parties are unable to agree upon mutually satisfactory regulations, the district court shall determine the scope of the State's authority in the light of the evidence presented and standards set forth in applicable cases.[19].

Affirmed in part, and remanded for further proceedings consistent with this opinion.

[19] In view of our conclusion to remand for further proceedings, we see no reason to supplement the record by admitting the "Klamath Tribal Wildlife Management Plan".



**Appendix B**

(Entered September 10, 1976)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

| | | |
|---|---|---|
| CHARLES E. KIMBALL, STEPHEN L. LANG, ALLAN LANG, LEONARD O. NORRIS, JR., and JAMES KIRK, Plaintiffs, | ) | Civil No. 73-155 |
| vs. | ) | OPINION |
| JOHN D. CALLAHAN, et al., Defendants. | ) | |

SOLOMON, Judge:

Plaintiffs, five Klamath Indians, brought this action for a declaratory judgment and for an injunction against the director and members of the Oregon Game Commission, now known as the Oregon Fish and Wildlife Commission, and the director of the Oregon State Patrol. They sought to prevent the defendants from enforcing hunting and fishing regulations against the Indians on their ancestral Klamath Reservation.

In a memorandum opinion dated March 15, 1973, I granted the defendants' motion to dismiss for failure to state a claim upon which relief could be granted. I questioned whether this Court had civil rights jurisdiction under 42 U.S.C. § 1983 and whether each plaintiff could invoke federal question jurisdiction under 28 U.S.C. § 1331 by showing that the controversy as to him exceeded $10,000. The Court of Appeals reversed. 493 F.2d 564 (1974). It concluded that there was jurisdiction; and, relying on *Menominee Tribe of*

*Indians v. United States,* 391 U.S. 404 (1968), held that the plaintiffs were entitled to a declaration that they retained their exclusive treaty rights to hunt, fish, and trap on their ancestral reservation.

Although the Court of Appeals found that this Court has jurisdiction and that the Indians' rights to hunt, fish, and trap on their ancestral reservation are exclusive, the defendants have again raised the issues of jurisdiction and the State's power to regulate. These issues were decided by the Court of Appeals. They are now the law of the case.

The defendants also contend that if the rights of the Indians to hunt, fish, and trap are exclusive, those rights must be limited to those Indians whose names appear on the final roll of the tribe, prepared in 1957.

If Congress intended the Klamath Termination Act to terminate all of the treaty rights of the Klamath Indians on the death of the last survivor whose name appeared on the final tribal roll, Congress could have so provided in clear and unambiguous language. Under *Menominee Tribe of Indians v. United States,* 391 U.S. at 413, " 'the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.' "

I therefore hold that the rights of the Klamath Indians to hunt, fish, and trap, free of State regulations, extend to the descendants of persons on the 1957 final tribal roll.

Plaintiffs do not seek to exercise their treaty rights on land sold to private owners who prohibit hunting, fishing, and trapping on that land. Neither do they seek to enforce exclusive rights on the remaining land, most of which is owned by the United States Government.



They are willing to permit State regulation under the following conditions:

> "1. The specific statute or regulation is required to prevent demonstrable harm to the actual conservation of the game or fish, *i.e.,* it is essential to the perpetuation of a particular species of game or fish.
>
> "2. The measure is appropriate to its purpose.
>
> "3. Klamath Indian tribal regulation for enforcement is inadequate to prevent demonstrable harm to the actual conservation of the game and fish.
>
> "4. The conservation required cannot be achieved to the full extent necessary by restriction of hunting, fishing and trapping by non-treaty sportsmen."

These conditions appear to conform with the current principles of State regulation of off-reservation fishing rights set forth in *United States v. Washington,* 520 F.2d 676 (9th Cir. 1975), and *Sohappy v. Smith,* 302 F.Supp. 899 (D.Or. 1969).

Recently, the General Council of the Klamath Tribe approved comprehensive regulations for the hunting of game by Klamath Indians on the former Klamath Reservation. The plan provides for joint regulation with State agencies.

Apparently the plaintiffs want me to approve their proposal. Although their objectives appear to be commendable, I have no authority to judicially approve their proposals. Nevertheless, I hope that the Oregon Fish and Wildlife Commission will approve these proposals; or if the Commission is unable to approve all of them, that the Commission will meet with

representatives of the Klamath Indians and promulgate mutually satisfactory regulations for the management of the fish and game resources on these lands.

Within 30 days, counsel shall prepare a joint statement on the remaining issues in this case with a time schedule for the filing of briefs and the presentation of evidence.

(Entered May 11, 1977)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

| | | |
|---|---|---|
| CHARLES E. KIMBALL, STEPHEN L. LANG, ALLAN LANG, LEONARD O. NORRIS, JR., and JAMES KIRK, Plaintiffs, vs. JOHN D. CALLAHAN, et al., Defendants. | ) | **Civil No. 73-155** **ORDER AND OPINION** |

SOLOMON, Judge:

Plaintiffs' motion to amend the judgment to provide that plaintiffs' hunting and fishing rights are protected from unconstitutional infringement by persons acting under color of state law under 42 U.S.C. § 1983 is denied.

The plaintiffs filed this motion as a basis for their claim that under the recently enacted Civil Rights Attorneys' Fees Awards Act, Public Law 94-559, 90 Stat. 2641 (Oct. 19, 1976), they are entitled to an allowance of attorneys' fees.

In my original memorandum opinion dated March 15, 1973, I questioned the jurisdiction of this Court



under 42 U.S.C. § 1983. I also questioned whether the plaintiffs could invoke federal question jurisdiction under 28 U.S.C. § 1331. I granted defendants' motion to dismiss for failure to state a claim upon which relief can be granted without passing on the jurisdictional issue.

The Court of Appeals reversed, relying on *Menominee v. United States,* 391 U.S. 404 (1968). The appellate court did consider the question of jurisdiction. It held that the District Court had jurisdiction if the amount in controversy exceeded $10,000 and arose under the Constitution, laws, or treaties of the United States under 28 U.S.C. § 1331. The Court said:

> "We find jurisdiction. The matter in controversy is the right to be free from state regulations, and the value of this right is measured by the extent to which plaintiffs' treaty rights to hunt and fish would be impaired by state regulation." *Kimball v. Callahan,* 493 F.2d 564, 565 (9th Cir. 1974).

Although the Court of Appeals had the opportunity and was invited to find jurisdiction under 28 U.S.C. § 1343(3), the jurisdictional basis for a claim under Section 1983, the Court elected not to do it.

When the case was returned to me, the defendants again raised the question of jurisdiction and the state's power to regulate. I held that, "These issues were decided by the Court of Appeals. They are now the law of the case." I did it on the basis of the Court of Appeals' holding that the District Court had jurisdiction under 28 U.S.C. § 1331, and not on the basis that this Court has jurisdiction under 28 U.S.C. § 1343(3).

Nothing contained in the briefs submitted by the parties on plaintiffs' motion to amend the judgment

convinces me that I should grant plaintiffs' motion. I am content to leave the judgment the way I signed it.

Even if I had held that the amendment should be granted, I would not grant plaintiffs attorneys' fees in this case because I think that the facts here are exceptional facts that do not justify an award of attorneys' fees.



## Appendix C

(Entered February 26, 1974)

Charles E. KIMBALL et al, Plaintiffs-Appellants,
v.
John D. CALLAHAN et al, Defendants-Appellees.
No. 73-1512.

United States Court of Appeals,
Ninth Circuit.
Feb. 26, 1974.

Before KOELSCH, WRIGHT and KILKENNY, Circuit Judges.

OPINION

EUGENE A. WRIGHT, Circuit Judge:

Plaintiffs-appellants are Klamath Indians by racial ancestry and claim rights under the Treaty of October 14, 1864, 16 Stat. 707, which established the Klamath and Modoc Reservation in Oregon. Pursuant to the Klamath Termination Act, 25 U.S.C. §§ 564-564x, plaintiffs or their ancestors elected to withdraw from the tribe and have their interest in tribal property converted into money and paid to them. 25 U.S.C. § 564d(a)(2).[1] In order to pay the withdrawing members of the tribe, part of the original tribal property was sold, the greater part being taken by the United States. It now forms a part of the Winema National Forest and the Klamath Forest National Wildlife Refuge.

[1] For a description of the termination process, *see* Klamath and Modoc Tribes v. United States, 436 F.2d 1008, 93 Ct.Cl. 670, cert. denied, Anderson v. United States, 404 U.S. 950, 92 S.Ct. 271, 30 L.Ed.2d 267 (1971).

Plaintiffs seek a declaratory judgment declaring their right to hunt, trap, and fish within their ancestral Klamath Indian Reservation free of Oregon fish and game regulations, pursuant to the Treaty of October 14, 1864, *supra.* They also seek an injunction restraining defendants, officers of the State of Oregon, from applying and enforcing Oregon fish and game regulations against them within the boundaries of the old reservation.

The district court denied relief and dismissed the complaint for failure to state a claim upon which relief could be granted. We reverse and grant plaintiffs the declaratory relief they seek.

## I

## JURISDICTION

At the outset, we note that the defendants challenge the jurisdiction of this court and the district court over the subject matter of this action. The district court had jurisdiction if the matter in controversy exceeded the sum or value of $10,000, exclusive of interest and costs, and arose under the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1331. We find jurisdiction. The matter in controversy is the right to be free from state regulations, and the value of this right is measured by the extent to which plaintiffs' treaty rights to hunt and fish would be impaired by state regulation. Yoder v. Assiniboine and Sioux Tribes of Fort Peck Indian Reservation, 339 F.2d 360, 363 (9th Cir. 1964).

More specifically, the amount in controversy is measured by determining the value to each plaintiff of the game and fish he would take if completely free of



regulation, less the value of the limited amounts of game and fish he could take if regulated by the state.[2] Under similar circumstances this court has found jurisdiction under 28 U.S.C. § 1331, thereby implicitly finding a matter in controversy exceeding a value of $10,000. Holcomb v. Confederated Tribes of Umatilla Indian Reservation, 382 F.2d 1013, 1014 n. 4 (9th Cir. 1967); *see also* Leech Lake Band of Chippewa Indians v. Herbst, 334 F.Supp. 1001, 1002 (D.Minn.1971). At any rate, we cannot say with "a legal certainty" that the value of the matter in controversy is really less than the jurisdictional amount. City of Inglewood v. City of Los Angeles, 451 F.2d 948, 952 (9th Cir. 1972).[3]

## II

## THE TREATY RIGHTS

The Treaty of October 14, 1864, 16 Stat. 707, described the boundaries of the Klamath and Modoc Reservation and stated that the described tract "shall, until otherwise directed by the President of the United States, be set apart as a residence for said Indians, [and] held and regarded as an Indian reservation. . ." The treaty secured for the Indians "the exclusive right of taking fish in the streams and lakes included in said reservation. . . ." In 1956 the district court judicially interpreted this treaty also to provide the Indians with the exclusive right to hunt and trap on the reservation without state regulation or control. Klamath & Modoc Tribes v. Maison, 139 F.Supp. 634 (D.Or.1956).

[2] We do not decide whether the damages to the individual plaintiffs can be aggregated to reach the sum of $10,000.

[3] Given jurisdiction under 28 U.S.C. § 1331, the district court had the power, under 28 U.S.C. § 2201, to render the declaratory relief sought by plaintiffs. This court has jurisdiction under 28 U.S.C. § 1291.

Before deciding if these rights survive the Klamath Termination Act, we first consider whether the treaty was correctly interpreted to include hunting and trapping rights.[4]

In Menominee Tribe v. United States, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968), the Supreme Court considered the Treaty of Wolf River of 1854, 10 Stat. 1064, which granted the Menominee Indians a reservation in Wisconsin. The treaty made no mention of hunting and fishing rights, but provided that the reservation was to be held by the Indians "for a home, to be held as Indian lands are held." The Court agreed with the Court of Claims that this language includes the right to hunt and fish. 391 U.S. at 406, 88 S.Ct. 1705;)[5] Menominee Tribe v. United States, 388 F.2d 998, 1002, 179 Ct.Cl. 496, 503-504 (1967); State v. Sanapaw, 21 Wis.2d 377, 383, 124 N.W.2d 41, 44 (1963).

We find that the language "set apart as a residence for said Indians, [and] held and regarded as an Indian reservation" also includes those rights. The specific treaty provision reserving the Klamaths' exclusive right to fish could prompt the argument that their

[4]Defendants state that an earlier decision of this court overruled the district court's interpretation of the treaty to include hunting and trapping rights. This is incorrect. In Klamath and Modoc Tribes v. Maison, 338 F.2d 620 (9th Cir. 1964), we held, incorrectly in light of Menominee Tribe v. United States, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968), that whatever treaty rights the Indians had on land transferred as a result of the Klamath Termination Act were lost. We did not find that the treaty failed to provide hunting and trapping rights. We held that if § 564m(b) of the Act provides fishing rights on the severed land, a question not before us at the time, the rights would be grounded in an express statutory grant rather than in the treaty. Section 564m(b) is discussed in part III of this opinion, *infra*.

[5]The Court noted that this language sums up in one phrase "the familiar provisions of earlier treaties which recognized hunting and fishing as normal incidents of Indian life." 391 U.S. at 406 n. 2, 88 S.Ct. at 1707.



treaty excludes the right to hunt. However, in light of the highly significant role that hunting and trapping played (and continue to play) in the lives of the Klamaths,[6] it seems unlikely that they would have knowingly relinquished these rights at the time they entered into the treaty. *See* Menominee Tribe v. United States, 391 U.S. at 406, 88 S.Ct. 1705; State v. Sanapaw, *supra,* 21 Wis.2d at 383, 124 N.W.2d at 44. Moreover, they enjoyed the exclusive rights to hunt, trap, and fish for almost 100 years with the consent and acquiescence of the State of Oregon. Klamath and Modoc Tribes v. Maison, 139 F.Supp. 634, 637 (D.Or.1956). These facts, coupled with our duty to construe the treaty favorably to the Indians with whom it was made,[7] lead us to conclude that the treaty provides exclusive rights to hunt and trap, as well as fish, free of state regulation.

## III
## EFFECT OF THE KLAMATH TERMINATION ACT

In 1954 Congress passed the Klamath Termination Act, which became fully effective in 1961. 25 U.S.C. §§ 564-564x. The express purpose of this Act was to terminate federal supervision over the Klamath Tribe

[6]Klamath & Modoc Tribes v. Maison, 139 F.Supp. 634 (D. Or.1956).

[7]The Supreme Court in *Menominee Tribe* reiterated its earlier statement in United States v. Winans, 198 U.S. 371, 380-381, 25 S.Ct. 662, 49 L.Ed. 1089 (1905), that

> "[W]e will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right, without regard to technical rules.' "

391 U.S. at 406 n. 2, 88 S.Ct. at 1707; McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973).

of Indians, to dispose of federally owned property acquired for the administration of Indian affairs, and to terminate the provision of federal services to the Indians solely because of their status as Indians.

Pursuant to the Klamath Termination Act, a final roll of all adult members of the tribe was prepared and published in 1956. 25 U.S.C. § 564b. Under the Act, each person whose name appeared on this tribal roll had to elect whether to withdraw from the tribe and receive the money value of his interest in tribal property or to remain in the tribe and participate in a nongovernmental tribal management plan. The Act provides that "[m]embers of the tribe who receive the money value of their interests in tribal property shall thereupon cease to be members of the tribe. . . ." 25 U.S.C. § 564e(c).

On the final tribal roll were 2,133 persons. Of these, 1,660 elected to withdraw from the tribe and take their interests in cash. The remaining 473 elected to retain their interests in land and to participate in the land management plan. A part of tribal land proportionate to the number of remaining members was transferred to a private trustee to administer under the statutory management plan. The remainder was sold to pay the withdrawn members, and the majority of this portion is now United States national forest land.

Plaintiffs are five Klamath Indians who withdrew from the tribe. They claim that they nevertheless retain treaty rights to hunt, trap, and fish free of state regulation on the former Indian land that was sold to pay them for their shares in tribal property. Feeling



compelled by Menominee Tribe v. United States, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968), we agree.

The Menominee Termination Act [25 U.S.C. §§ 891-902] is similar in several respects to the Klamath Termination Act. Both provide basically for the termination of federal supervision over the property and members of the respective tribes. The Wisconsin Supreme Court held in State v. Sanapaw, 21 Wis.2d 377, 124 N.W.2d 41 (1963), that the hunting and fishing rights of the Menominee Indians were abrogated by Congress in the Menominee Termination Act. The tribe then brought suit against the United States in the Court of Claims to recover damages for the loss of those rights. Menominee Tribe of Indians v. United States, 388 F.2d 998, 179 Ct.Cl. 496 (1967). That court awarded no damages, concluding that the Termination Act did not abrogate the Indians' rights to hunt and fish. 388 F.2d at 1005-1006.

The Supreme Court affirmed the Court of Claims. Menominee Tribe of Indians v. United States, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968). The Court noted that the effect of the Termination Act was that all federal supervision over the tribe and tribal property was to end and that "the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction." 25 U.S.C. § 899. The Court acknowledged that this language supports a forceful argument that the Termination Act submitted the hunting and fishing rights of the Indians to state regulation and control. The Court, however, reached the opposite conclusion. 391 U.S. at 410, 88 S.Ct. 1705.

Its conclusion was based in large part on Public Law 280 [18 U.S.C.§ 1162], passed at the same time as the Menominee and Klamath Termination Acts and which became effective seven years before the Termination Acts became fully effective. That law granted certain states jurisdiction "over offenses committed by or against Indians in the areas of Indian country" named in the Act, which in the case of Wisconsin was described as "All Indian country within the State", and in the case of Oregon, as "All Indian country within the State except the Warm Springs Reservation." But Public Law 280 provided further that "Nothing in this section . . . shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute *with respect to hunting, trapping, or fishing* or the control, licensing, or regulation thereof." (Emphasis added.)

The Supreme Court noted that, at the time Public Law 280 became effective in 1954, the Menominee Reservation had not been terminated and it was still "Indian country" within the meaning of the law. Similarly, the Klamath and Modoc Reservation in Oregon was still "Indian country." The Court held that Public Law 280 preserved treaty hunting and fishing rights even after termination. The Court's reasoning compels our conclusion in the present case.

> Public Law 280 must therefore be considered *in pari materia* with the Termination Act. The two Acts read together mean to us that although federal supervision of the tribe was to cease *and all tribal property was to be transferred to new hands,* the hunting and fishing rights granted or preserved by the Wolf River Treaty of 1854 survived the Termination Act of 1954.

391 U.S. at 411, 88 S.Ct. at 1710. [Emphasis added.]



The Court stated that this construction is in accord with the purpose of the Termination Act, which is only to terminate federal *supervision* over tribal property and members. Both the Menominee and the Klamath Termination Acts contain a provision rendering inapplicable "all statutes of the United States which affect Indians because of their status as Indians." 25 U.S.C. §§ 899 and 564q. The Court stated that this provision "plainly refers to the termination of federal supervision. The use of the word 'statutes' is potent evidence that no *treaty* was in mind." 391 U.S. at 412, 88 S.Ct. at 1711.

The Court emphasized that it would not "construe the Termination Act as a back-handed way of abrogating the hunting and fishing rights of these Indians." It stated that the intention to abrogate or modify a treaty is not to be lightly imputed to Congress, and it found it "difficult to believe that Congress, without explicit statement, would subject the United States to a claim for compensation by destroying property rights conferred by treaty . . . ." 391 U.S. at 412-413, 88 S.Ct. at 1711.

Defendants argue that *Menominee Tribe* is distinguishable because of significant differences between the Menominee and Klamath Termination Acts. True, unlike the Klamath Termination Act, the Menominee Act gave no option to the Menominee Indians to withdraw from the tribe and receive the money value

of their interests in tribal property.[8] Also, although title to the reservation changed hands in *Menominee Tribe,* the Menominees continued to occupy the same land before and after the Termination Act. The disputed land in this case, on the other hand, is no longer legally occupied by the Klamaths.

While these are substantial points of distinction, we find nothing in the language of *Menominee Tribe* to indicate its reasoning does not transcend these distinctions.[9]

Defendants also contend that the reasoning of an earlier decision of this court supports their position. In Klamath and Modoc Tribes v. Maison, 338 F.2d 620 (9th Cir. 1964), certain members of the Klamath tribe, none of whom had elected to convert his tribal interest into money, sought a declaration of their right to hunt and trap, free from Oregon regulation and control, in an area that had formed part of their reservation prior to the Klamath Termination Act. This Court refused to grant such relief and held that, as a result of the Termination Act, no treaty rights attach to land severed from the former reservation. We acknowledge

[8]The Menominee Termination Act did, however, provide for the payment of $1,500 to each member of the tribe on the final tribal roll. 25 U.S.C. § 894.

[9]Indeed, the reason of *Menominee Tribe* may be even more compelling in this case. At the hearings on the Klamath Termination bill, Senator Watkins suggested that the Government "buy out" the Indians' hunting and fishing rights rather than preserve them after termination. See Joint Hearings, Subcommittees of the Committee on Interior and Insular Affairs, 83d Cong., 2d Sess., Pt. 4, on S.2745 and H.R.7320 pp. 254-55. Congress did not heed this suggestion, however.

The Klamath Termination Act provides that withdrawn members of the tribe relinquish their interests in tribal property. 25 U.S.C. § 564e(c). Treaty rights to hunt and fish are, however, rights of the individual Indians. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 181, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973); Mason v. Sams, 5 F.2d 255, 258 (W.D.Wash.1925).



that the Termination Act does not expressly deal with any treaty rights respecting hunting and trapping. We held, however, that the treaty rights are limited to the lands of the reservation and that the Act, by effectively reducing the size of the reservation, "most certainly reduced the area to which those rights attach." 338 F.2d at 623.

This reasoning cannot stand in light of *Menominee Tribe.* It is inconsistent with the Supreme Court's requirement that Congress clearly indicate when it intends to abrogate treaty rights. Moreover, it is inconsistent with the Court's construction of Public Law 280 that treaty rights with respect to hunting, trapping, or fishing survive the Termination Acts to the extent that they attach to land known as "Indian country" at the time Public Law 280 became effective.

Congress not only failed to indicate clearly an intent to abrogate treaty rights; it in fact expressly preserved at least fishing rights on the former reservation. The Termination Act provides that "[n]othing [in the Act] shall abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty." 25 U.S.C. § 564m(b). This court in Klamath and Modoc Tribes v. Maison, 338 F.2d 620 (9th Cir. 1964), stated that if this provision does provide fishing rights on the entire former reservation, a question not before us at the time, it did so by an express statutory grant since the treaty rights themselves could only extend to the now shrunken reservation. Defendants in this case offer a different interpretation and suggest that § 564m(b) does not aid plaintiffs since it applies to "the tribe or the members

thereof" and plaintiffs are no longer "members" of the tribe.

Neither of these constructions withstands analysis. Since the Act provides that nothing in it shall abrogate any treaty fishing rights, we conclude that a Klamath Indian possessing such rights on the former reservation at the time of its enactment retains them even though he relinquishes his tribal membership or the reservation shrinks pursuant to the Act. Otherwise, the Act would in fact have resulted in the abrogation of treaty rights.

One final consideration this court must make concerns the extent of plaintiffs' rights that we here hold survive the Termination Act. Plaintiffs seek no rights against private landowners, acknowledging that those persons might properly exclude Klamaths and anyone else from hunting and fishing if they so desire.[10] Plaintiffs do, however seek a declaration, and we so hold, that they may exercise their treaty hunting, trapping, and fishing rights free of state fish and game regulations on the lands constituting their ancestral Klamath Indian Reservation, including that land now constituting United States national forest land and that privately owned land on which hunting, trapping, or fishing is permitted.[11]

Accordingly the judgment of the district court is reversed.

[10] We make no holding and intimate no opinion on the treaty rights of the Indians vis-a-vis the private Oregon landowners.

[11] Plaintiffs do not seek *exclusive* rights to hunt, trap, and fish on land transferred pursuant to the Termination Act.



## Appendix D
(Entered March 15, 1973)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

| | |
|---|---|
| CHARLES E. KIMBALL, STEPHEN L. LANG, ALLAN LANG, LEONARD O. NORRIS, JR., and JAMES KIRK, Plaintiffs, vs. JOHN D. CALLAHAN, ALLAN L. KELLY, PAT J. METKE, FRANK A. MOORE, and JAMES W. WHITTAKER, each individually, and as a member of the STATE GAME COMMISSION OF THE STATE OF OREGON; JOHN McKEAN, individually, and as DIRECTOR OF THE OREGON GAME COMMISSION; and HOLLY HOLCOMB, individually, and as DIRECTOR OF THE OREGON STATE PATROL & OREGON GAME ENFORCEMENT DIVISION, Defendants. | Civil No. 73-155<br>MEMORANDUM OPINION<br>March 15, 1973 |

At the conclusion of the oral argument, I said that I questioned the jurisdiction of this Court in this case—first, on the issue of whether 42 U.S.C. § 1983 is applicable, and, second, whether as a matter of law it appears that each plaintiff has or can suffer $10,000 in damages if jurisdiction is based on 28 U.S.C. § 1331.

However, I do not decide this case on a jurisdictional ground because I believe that plaintiffs have failed to state a claim upon which relief can be granted. The plaintiffs are withdrawn members of the Klamath Tribe. Pursuant to the provisions of the Termination Act, they have received their allocable shares of the assets of the Tribe in cash. They now assert that notwithstanding the receipt of this money, they still

have fishing and hunting rights on the lands of their original ancestral tribal reservation.

At oral argument plaintiffs conceded that if their theory is right, the withdrawn Indians would have the privilege of fishing and hunting on land sold to private individuals. If, for example, Safeway Stores or U. S. Steel Corporation constructed buildings on the premises, the withdrawn members could still fish and hunt on that land. This would have the effect of reducing the value of all the remaining land belonging to fellow tribesmen who did not withdraw.

I do not believe that any of the cases cited support the plaintiffs' theory. I do not discuss them here because I know that both counsel for plaintiffs and the Attorney General can competently present their legal arguments to the appellate courts. I make this statement in order to inform the parties and the appellate courts the basis for my decision to grant defendants' motion to dismiss on the ground that plaintiffs failed to state a claim upon which relief can be granted.



## Appendix E

Article VI, Constitution of the United States:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

## Appendix F
(16 Stat 707)

"Treaty between the United States of America and the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians: Concluded, October 14, 1864; Ratification advised, with Amendments, July 2, 1866; Amendments assented to, December 10, 1869; Proclaimed, February 17, 1870.

* * * * *

"ARTICLE I. The tribes of Indians aforesaid cede to the United States all their right, title, and claim to all the country claimed by them, the same being determined by the following boundaries, to wit: * * * *Provided,* That the following described tract, within the country ceded by this treaty, shall, until otherwise directed by the President of the United States, be set apart as a residence for said Indians, [and] held and regarded as an Indian reservation, to wit: * * * And the tribes aforesaid agree and bind themselves that, immediately after the ratification of this treaty, they will remove to said reservation and remain thereon, unless temporary leave of absence be granted to them by the superintendent or agent having charge of the tribes.

"It is further stipulated and agreed that no white person shall be permitted to locate or remain upon the reservation, except the Indian superintendent and agent, employes of the Indian department, and officers of the army of the United States, *guaranteed* [and] that in case persons other than those specified are found upon the reservation, they shall be immediately expelled therefrom; and the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its



limits, is hereby secured to the Indians aforesaid: *Provided, also,* That the right of way for public roads and railroads across said reservation is *guaranteed* [reserved] to citizens of the United States."

## Appendix G

## KLAMATH TRIBE—TERMINATION OF FEDERAL SUPERVISION

(68 Stat. 718, 25 U.S.C. § 564 - § 564w, as amended).

**§ 564. (Section 1)**

The purpose of this Act is to provide for the termination of Federal supervision over the trust and restricted property of the Klamath Tribe of Indians consisting of the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians, and of the individual members thereof, for the disposition of federally owned property acquired or withdrawn for the administration of the affairs of said Indians, and for a termination of Federal services furnished such Indians because of their status as Indians.

**§ 564a. (Section 2)**

For the purposes of this Act:

(a) "Tribe" means the Klamath Tribe of Indians consisting of the Klamath and Modoc Tribes and Yahooskin Band of Snake Indians.

(b) "Secretary" means the Secretary of the Interior.

(c) "Lands" means real property, interests therein, or improvements thereon, and includes water rights.

(d) "Tribal property" means any real or personal property, including water rights, or any interest in real or personal property, that belongs to the tribe and either is held by the United States in trust for the tribe or is subject to a restriction against alienation imposed by the United States.



(e) "Adult" means a person who is an adult according to the law of the place of his residence.

**§ 564b. (Section 3)**

At midnight of the date of enactment of this Act the roll of the tribe shall be closed and no child born thereafter shall be eligible for enrollment: Provided, That the tribe shall have a period of six months from the date of this Act in which to prepare and submit to the Secretary a proposed roll of the members of the tribe living on the date of this Act, which shall be published in the Federal Register. If the tribe fails to submit such roll within the time specified in this section, the Secretary shall prepare a proposed roll for the tribe, which shall be published in the Federal Register. Any person claiming membership rights in the tribe or an interest in its assets, or a representative of the Secretary on behalf of any such person, may, within ninety days from the date of publication of the proposed roll, file an appeal with the Secretary contesting the inclusion or omission of the name of any person on or from such roll. The Secretary shall review such appeals and his decisions thereon shall be final and conclusive. After disposition of all such appeals, the roll of the tribe shall be published in the Federal Register, and such roll shall be final for the purposes of this Act.

**§ 564c. (Section 4)**

Upon publication in the Federal Register of the final roll as provided in section 3 of this Act, the rights or beneficial interests in tribal property of each person whose name appears on the roll shall constitute

personal property which may be inherited or bequeathed, but shall not otherwise be subject to alienation or encumbrance before the transfer of title to such tribal property as provided in section 6 of this Act without the approval of the Secretary. Any contract made in violation of this section shall be null and void. Property which this section makes subject to inheritance or bequest and which is inherited or bequeathed after August 13, 1954, and prior to the transfer of title to tribal property as provided in section 6 of this Act shall not be subject to State or Federal inheritance, estate, legacy, or succession taxes.

**§ 564d. (Section 5)**

(a) The Secretary is authorized and directed to select and retain by contract, at the earliest practicable time after the enactment of this Act and after consultation with the tribe at a general meeting called for that purpose, the services of qualified management specialists who shall—

(1) cause an appraisal to be made, within not more than twelve months after their employment, or as soon thereafter as practicable, of all tribal property showing its fair market value by practicable logging or other appropriate economic units;

(2) immediately after the appraisal of the tribal property and approval of the appraisal by the Secretary, give to each member whose name appears on the final roll of the tribe an opportunity to elect to withdraw from the tribe and have his interest in tribal property converted into money and paid to him, or to remain in the tribe and participate in the tribal management plan to be prepared pursuant to paragraph (5) of this subsection; . . .



(3) determine and select the portion of the tribal property which if sold at the appraised value would provide sufficient funds to pay the members who elect to have their interests converted into money, arrange for the sale of such property, and distribute the proceeds of sale among the members entitled thereto: . . .

Provided further, That when determining and selecting the portion of the tribal property to be sold, due consideration shall be given to the use of such property for grazing purposes by the members of both groups of the tribe;

(4) cause such studies and reports to be made as may be deemed necessary or desirable by the tribe or by the Secretary in connection with the termination of Federal supervision as provided for in this Act;

(5) cause a plan to be prepared in form and content satisfactory to the members who elect to remain in the tribe and to the Secretary for the management of tribal property through a trustee, corporation, or other legal entity. If no plan that is satisfactory both to the members who elect to remain in the tribe and to the Secretary has been prepared six months before the time limit provided in subsection 6(b) of this Act, as amended, the Secretary shall adopt a plan for managing the tribal property, subject to the provisions of section 15 of this Act, as amended.

(b) Such amounts of Klamath tribal funds as may be required for the purposes of this section shall be available for expenditure by the Secretary. In order to reimburse the tribe, in part, for expenditure of such tribal funds as the Secretary deems necessary for the purposes of carrying out the requirements of this section, there is hereby authorized to be appropriated

out of any money in the Treasury not otherwise appropriated, an amount equal to one-half of such expenditures from tribal funds, or the sum of $550,000, whichever is the lesser amount.

**§ 564e. (Section 6)**

(a) The Secretary is authorized and directed to execute any conveyancing instrument that is necessary or appropriate to convey title to tribal property to be sold in accordance with the provisions of paragraph (3) of subsection (a) of section 5 of this Act, and to transfer title to all other tribal property to a trustee, corporation, or other legal entity in accordance with the plan prepared pursuant to paragraph (5) of subsection (a) of section 5 of this Act.

(b) It is the intention of the Congress that all of the actions required by sections 5 and 6 of this Act shall be completed at the earliest practicable time and in no event later than seven years from the date of this Act.

(c) Members of the tribe who receive the money value of their interests in tribal property shall thereupon cease to be members of the tribe: Provided, That nothing shall prevent them from sharing in the proceeds of tribal claims against the United States.

**§ 564m. (Section 14)**

(a) Nothing in this Act shall abrogate any water rights of the tribe and its members, and the laws of the State of Oregon with respect to the abandonment of water rights by non-use shall not apply to the tribe and its members until fifteen years after the date of the proclamation issued pursuant to section 18 of this Act.



(b) Nothing in this Act shall abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty.

**§ 564q. (Section 18)**

(a) **Publication—Termination of Federal Services—Application of Federal and State laws.** Upon removal of Federal restrictions on the property of the tribe and individual members thereof, the Secretary shall publish in the Federal Register a proclamation declaring that the Federal trust relationship to the affairs of the tribe and its members has terminated. Thereafter individual members of the tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians and, except as otherwise provided in this Act, all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.

(b) **Citizenship status unaffected.** Nothing in this Act shall affect the status of the members of the tribe as citizens of the United States.

**§ 564r. (Section 19)**

Effective on the date of the proclamation provided for in section 18 of this Act, all powers of the Secretary or other officer of the United States to take, review, or approve any action under the constitution and bylaws of the tribe are hereby terminated. Any powers conferred upon the tribe by such constitution which are

inconsistent with the provisions of this Act are hereby terminated. Such termination shall not affect the power of the tribe to take any action under its constitution and bylaws that is consistent with this Act without the participation of the Secretary or other officer of the United States.

## 1958 AMENDMENTS TO THE KLAMATH TERMINATION ACT (Section 28)

(72 Stat. 816, 25 U.S.C. § 564w-1, as amended.)

**§ 564w-1. (Section 28)**

Notwithstanding the provisions of sections 5 and 6 of the Act of August 13, 1954 (68 Stat. 718), and all Acts amendatory thereof—

**(a) Designation of boundaries.** The tribal lands that comprise the Klamath Indian Forest, and the tribal lands that comprise the Klamath Marsh, shall be designated by the Secretary of the Interior and the Secretary of Agriculture, jointly.

**(b) Sales—Terms and conditions.** The portion of the Klamath Indian Forest that is selected for sale pursuant to subsection 5(a)(3) of this Act to pay members who withdraw from the tribe shall be offered for sale by the Secretary of the Interior in appropriate units, on the basis of competitive bids, to any purchaser or purchasers who agree to manage the forest lands as far as practicable according to sustained yield procedures so as to furnish a continuous supply of timber according to plans to be prepared and submitted by them for approval and inclusion in the conveyancing instruments in accordance with specifications and requirements referred to in the invitations



for bids: Provided, That no sale shall be for a price that is less than the realization value of the units involved determined as provided in subsection (c) of this section. The terms and conditions of the sales shall be prescribed by the Secretary . . . The purchase price paid by the grantee shall be deemed to represent the full appraised fair market value of the lands, undiminished by the right of reversion retained by the United States in a nontrust status, and the retention of such right of reversion shall not be the basis for any claim against the United States. The Secretary of Agriculture shall be responsible for enforcing such conditions. Upon any reversion of title pursuant to this subsection, the lands shall become national forest lands subject to the laws that are applicable to lands acquired pursuant to the Act of March 1, 1911 (36 Stat. 961), as amended.

**(c) Appraisals—Notice to Congressional committees—Appropriation—Realization value—Report to Congressional committees.** Within sixty days after this section becomes effective the Secretary of the Interior shall contract by negotiation with three qualified appraisers or three qualified appraisal organizations for a review of the appraisal approved by the Secretary pursuant to subsection 5(a)(2) of this Act, as amended. In such review full consideration shall be given to all reasonably ascertainable elements of land, forest, and mineral values. . . . Upon the basis of a review of the appraisal heretofore made of the forest units and marsh lands involved and such other materials as may be readily available, including additional market data since the date of the prior

appraisal, but without making any new and independent appraisal, each appraiser shall estimate the fair market value of such forest units and marsh lands as if they had been offered for sale on a competitive market without limitation on use during the interval between the adjournment of the Eighty-fifth Congress and the termination date specified in subsection 6(b) of this Act, as amended. This value shall be known as the realization value. . . . No sale of forest units that comprise the Klamath Indian forest designated pursuant to subsection 28(a) shall be made under the provisions of this Act prior to April 1, 1959.

**(d) Unsold forest units and marsh lands—Title after publication in Federal Register—Aggregate realization value—Appropriation.** If all of the forest units offered for sale in accordance with subsection (b) of this section are not sold before April 1, 1961, the Secretary of Agriculture shall publish in the Federal Register a proclamation taking title in the name of the United States to as many of the unsold units or parts thereof as have, together with the Klamath Marsh lands acquired pursuant to subsection (f) of the section, an aggregated realization value of not to exceed $90,000,000, which shall be the maximum amount payable for lands acquired by the United States pursuant to this Act. Compensation for the forest lands so taken shall be the realization value of the lands determined as provided in subsection (c) of this section, unless a different amount is provided by law enacted prior to the proclamation of the Secretary of Agriculture. Appropriations of funds for that purpose is hereby authorized. Payment shall be made as soon



as possible after the proclamation of the Secretary of Agriculture. Such lands shall become national forest lands subject to the laws that are applicable to lands acquired pursuant to the Act of March 1, 1911 (36 Stat. 961), as amended. Any of the forest units that are offered for sale and that are not sold or taken pursuant to subsection (b) or (d) of this section shall be subject to sale without limitation on use in accordance with the provisions of section 5 of this Act.

**(e) Sale of retained lands to Secretary of Agriculture.** If at any time any of the Tribal lands that comprise the Klamath Indian Forest and that are retained by the tribe are offered for sale other than to members of the tribe, such lands shall first be offered for sale to the Secretary of Agriculture, who shall be given a period of twelve months after the date of each such offer within which to purchase such lands. No such lands shall be sold at a price below the price at which they have been offered for sale to the Secretary of Agriculture, and if such lands are reoffered for sale they shall first be reoffered to the Secretary of Agriculture. The Secretary of Agriculture is hereby authorized to purchase such lands subject to such terms and conditions as to the use thereof as he may deem appropriate, and any lands so acquired shall thereupon become national forest lands subject to the laws that are applicable to lands acquired pursuant to the Act of March 1, 1911 (36 Stat. 961), as amended.

**(f) Klamath Forest National Wildlife Refuge—Appropriation.** The lands that comprise the Klamath Marsh shall be a part of the property selected for sale pursuant to subsection 5(a)(3) of this Act to pay

members who withdraw from the tribe. Compensation for said taking shall be the realization value of the lands determined in accordance with subsection (c) of this section, and shall be paid out of funds in the Treasury of the United States, which are hereby authorized to be appropriated for that purpose.

**(g) Homesites.** Any person whose name appears on the final roll of the tribe, and who has since December 31, 1956, continuously resided on any lands taken by the United States by subsections (d) and (f) of this section, shall be entitled to occupy and use as a homesite for his lifetime a reasonable acreage of such lands, as determined by the Secretary of Agriculture, subject to such regulations as the Secretary of Agriculture may issue to safeguard the administration of the national forest and as the Secretary of the Interior may issue to safeguard the administration of the Klamath Forest National Wildlife Refuge.